

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2017

Public Authority: Nursing and Midwifery Council
Address: 23 Portland Place
London
W1B 1PZ

Decision (including any steps ordered)

1. The complainant has requested a copy a review into the way the Nursing and Midwifery Council (NMC) handled complaints about a named midwife together with the cost of producing the review. The NMC provided the information on its cost, but withheld the actual review under the exemptions provided by section 42 – legal professional privilege and section 40(2) - third party personal data.
2. The Commissioner's decision is that the NMC is entitled to rely on section 42 to withhold the review in its entirety. She has not therefore gone on to look at the application of section 40(2).
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 20 January 2017 the complainant requested information of the following description:

"... a copy of the review into the way the NMC handled the case of midwife (named midwife) as carried out by (named barrister) QC."

"Please also supply the cost to the NMC to commission this review"

On 27 January 2017 the NMC responded. It provided the cost of the commissioning the review but withheld the actual review. The NMC cited

section 42 – legal professional privilege and section 40(2) – third party personal data as its basis for doing so:

5. The complainant requested an internal review of the decision to withhold the review on 1 February 2017. The NMC sent her the outcome of the internal review on 1 March 2017. It upheld the original position.

Scope of the case

6. The complainant contacted the Commissioner 18 April 2017 to complain about the way her request for information had been handled. In particular she argued that the public interest in favour of disclosing the information outweighed the public interest in withholding it.
7. The Commissioner considers that the matter to be decided is whether the NMC is entitled to withhold the report under either of the exemptions cited.

Reasons for decision

Section 42 – legal professional privilege

8. Section 42 of FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
9. In broad terms, legal professional privilege protects the confidentiality of communications between a client and their legal adviser. This allows the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses or criticism of their client's position.
10. For the information to be capable of attracting legal professional privilege the information must form part of a communication either from the client to their legal adviser, or the legal adviser to the client. In this case the information consists of a barrister's written opinion on how the NMC had carried out one particular aspect of its regulatory function in respect of the named midwife, which was provided by a senior barrister to the NMC. It is clearly a communication between a legal adviser and their client.
11. In order to attract legal professional privilege the communication must have been made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created as opposed to the sole purpose. From the contents of the information it is clear that its purpose was to provide

the NMC with legal advice on whether its handling of the case relating to the named midwife was in accordance with its regulatory responsibilities.

12. The final test is whether the advice has remained confidential. Although when refusing the request the NMC did refer to a statement from one of its spokesmen which gave a brief summary of the review's conclusion, the Commissioner does not consider that this in any way undermines the confidentiality of the detailed substance of the report. The NMC advised the Commissioner that the advice remains confidential and stated categorically that it has not been made available to the public or disclosed in response to any other request under FOIA.
13. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated. NMC has not referred to any specific type of privilege when making its submission to the Commissioner. Although at the time of the request the NMC was conducting a regulatory investigation into the fitness to practise of the midwife about whom the advice related there was no actual litigation ongoing or in prospect that the Commissioner is aware of. In these circumstances the Commissioner considers the information could only attract advice privilege.
14. In light of the above the Commissioner finds that the review does attract legal professional privilege and therefore the exemption provided by section 42 is engaged.

Public interest test

15. Section 42 is subject to the public interest test as set out in section 2 of the FOIA. This means that although the exemption is engaged the information can only be withheld if in all the circumstances of the case the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
16. There is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. This is necessary so that they can lay out all the issues relevant to the matter they require advice on and so that the lawyer can respond in full to those enquiries. This may include explaining any weaknesses in, or criticism of their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights, or ensure they are acting in compliance with the law. This is why legal professional privilege is considered to be a cornerstone of the English legal system.
17. The NMC has said that it is particularly important for a regulatory body such as itself to be able have open and candid discussions with its legal

advisers to support the effective conduct of its statutory, regulatory functions. The Commissioner recognises there is an argument that additional weight should be given to protecting the confidentiality of advice where such advice is sought to ensure important functions, carried out to protect the public, are being performed correctly.

18. The Commissioner does not consider it appropriate to go into any great detail as to circumstances which led to the advice being sought and obviously cannot divulge of the content of the advice that was received. However it is already known that the advice relates to one of the midwives involved in the widely reported scandal arising out of events from 2008 onwards and involving the deaths of a number of babies and mothers in the care of the University Hospitals of Morecambe Bay NHS Foundation Trust. The midwife named in the request was originally referred to the NMC some years ago. Whilst her case was being considered there was a second serious incident and this led to a second referral. This prompted the NMC to consider whether, if it had handled the first referral differently and taken a different course of action, imposing an interim order either placing conditions on the midwife or suspending her, the second incident may have been prevented. This led to the NMC seeking the legal advice which is the subject of the request. The NMC described the commissioning of the advice as being the response of a responsible regulator. The Commissioner understands that the purpose of the advice was to see if any lessons could be learned from how it handled the case of the midwife named in the request which could be used to improve future case handling.
19. The Commissioner is aware that the NMC has been criticised for the role it played in regulating the named midwife and others employed by the Morecambe Bay Trust. The Commissioner will look at how this criticism impacts on the public interest in favour of disclosure later. However for now she recognises that the NMC was considering the very serious issue of whether the way it had performed its regulatory functions had been effective in protecting the public. The potential for this consideration to attract public and media attention would have made it very difficult for the NMC to seek candid legal advice if had not believed the advice would remain confidential.
20. From the NMC's submission the Commissioner also understands that at the time of the request, issues to which the advice related were still live. The regulatory proceedings against the midwife named in the request had been concluded by the time the request was made. However it is noted that it had only been concluded a few months earlier. The NMC has also identified to the Commissioner other nursing staff that are connected to the actions which gave rise to the proceedings against the named midwife and against whom proceedings were still ongoing. The Commissioner is satisfied that the legal advice is particularly relevant to

one of these individuals. This adds to the sensitivity of the legal advice and the weight given in favour of withholding it.

21. To summarise the public interest factors in favour of maintaining the exemption and withholding the legal advice; there is the very strong inherent value in the principle that individuals should be able to obtain robust legal advice in confidence. Additional weight may be added to this where the legal advice relates to the performance of regulatory activities aimed at protecting the public and where it could have proved difficult to properly consider these issues without the assurance of confidentiality. Finally the advice in question was still relatively new being produced in the August before the request was received. Furthermore it included consideration of issues relevant to proceedings that were ongoing at the time of the request. The Commissioner considers that there is very considerable public interest in maintaining the exemption. This has to be weighed against the public interest in disclosure.
22. Investigations into what had happened at the Morecambe Bay Trust raised very genuine concerns over the ability of those responsible for regulating the health service and its staff to properly investigate failings and put in place effective measures to safeguard patient safety. Some of that criticism has been directed at the NMC. There is therefore a very real public interest in knowing that the NMC has in fact identified any problems in its own performance and has taken the necessary steps to remedy those problems. This is particularly true when public confidence in the ability of a number of regulators to take appropriate action had been badly shaken by the events at the Morecambe Bay Trust. Where members of the public entrust their safety to others they should be able to do so in the knowledge that the highest standards of care and professionalism are being adhered to. Disclosure of the legal advice would serve that public interest.
23. Through internet searches the Commissioner is aware that there is to also be another, separate review of the NMC's handling of the Morecambe Bay cases. Although the NMC has not argued that the forthcoming review will address the public interest in disclosing the legal advice, the Commissioner has considered whether it has any relevance to the refusal of the complainant's request. This was first announced at the end of November 2016, after the legal advice which is the subject of this request was produced. Later, in February 2017, it was announced that the Department of Health and the NMC had asked the Professional Standards Authority (PSA) to conduct that review. It is understood that the PSA report will be published. It is clear therefore that at the time of the request a decision had been taken to conduct a second review.
24. Based on the terms of reference of the PSA review which are published on its website it appears that this new review will be wider ranging than

the scope of the legal advice. However the terms of reference make it clear that the PSA will not look at the substance of the NMC's decisions in particular cases. Therefore, even after the PSA report was published the Commissioner considers it likely that the legal advice would still shed light on aspects not covered by the PSA review. As a consequence the Commissioner is satisfied that there remains a weighty public interest in the disclosure of the legal advice.

25. The complainant has argued that the NMC has provided conflicting statements regarding the contents of the legal advice, initially saying it contained no criticism of the NMC only to later concede that it did. Where a public authority provides misleading accounts of the content of the legal advice it has received, the Commissioner considers there would be a greater public interest in its disclosure. She therefore challenged the NMC on this point. The NMC advised the Commissioner that it had told those immediately affected by the midwife's actions what the legal advice had concluded. The NMC essentially informed them that the review found that at no stage had the threshold for applying an interim order on the midwife been passed. This explanation was also provided to the complainant as part of the refusal notice issued in response to her request on 27 January 2017 and also to enquiries made by the press when they became aware of the existence of the advice. Having viewed the advice the Commissioner accepts that the brief description of the conclusion accords with that in the advice.
26. The NMC has said that it also informed those directly affected by the midwife's actions that the legal advice did not contain recommendations, but that the NMC did "take learning" from the report. The Commissioner does not consider the fact that the NMC found learning points in the advice to be incompatible with the legal advice concluding the NMC had not missed the opportunity to impose interim conditions on the midwife. Therefore she does not give weight to the argument that the NMC provided contradictory statements as to contents of the advice.
27. It is now necessary to balance the public interest in favour of maintaining the exemption against those in favour of disclosing the legal advice. Although the public's confidence in the ability of those regulating the health service was seriously damaged by events at the Morecambe Bay Trust the Commissioner finds that it is nevertheless of critical importance that the NMC feels free to obtain full and candid advice on how it carried out its regulatory duties in order to ensure that it does have the opportunity to learn any appropriate lessons from the its handling of case of the named midwife. The confidentiality of the lawyer/client relationship needs to be protected in this case not protect the NMC, but rather to protect the NMC's ability to have its performance scrutinised so that any potential improvements are identified and implemented in order to better protect the public. The Commissioner finds the public interest in maintaining the exemption outweighs the

public interest in disclosure. The NMC is entitled to rely on section 42 to withhold the advice.

28. As the Commissioner has found section 42 can be relied on to withhold the advice in its entirety she has not gone on to look at the application of section 40(2).

Right of appeal

29. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rob Mechan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF